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Welcome to the latest edition of our 'Clinical Thinking'

Welcome to the latest edition of our "Clinical Thinking". This issue starts with the latest on how COVID-19 clinical negligence and personal injury claims might develop. In addition we share some of the thoughts and information from many months of research and dialogue. Elsewhere we're getting ready to meet up face-to-face again, take a look at surgical mesh cases and have insights on the imminent arrival of QOCS for Scotland. Just click on the image or gold colour heading below and you'll go straight to that article. Enjoy reading our views; if you'd like to share yours, please get in touch with our team - contact details are on page 9.



COVID-19 CLINICAL NEGLIGENCE AND PERSONAL INJURY CLAIMS

The very latest including a potential 'minefield' of concerns surrounding nursing and care homes
- Page 2



NICE TO SEE YOU AGAIN! GETTING BACK TO FACE-TO-FACE

What we've got planned for the rest of the year for conferences, hospitality and some other events
- Page 3



COVID-19 CLAIMS UPDATE: PERCEPTIONS AND REALITY

Are we in the shallows but heading for the deep end? Insight from the legal front line - caution is needed!
- Page 4



SPECIAL REPORT: QOCS FOR SCOTLAND IMMINENT

Why now is the time for Scottish lawyers to offer pursuer clients affordable ATE insurance protection. - Page 6



ATE INSURANCE IN ACTION: SURGICAL MESH CASES

BBC TV's 'Casualty' drama used a recent episode to highlight this hidden but hugely important issue
- Page 8



REALLY QUITE INTERESTING? WHAT'S CAUGHT OUR EYE:

Links to some recent topical clinical negligence and personal injury news, opinion and events
- Page 8



Covid-19 clinical negligence and personal injury claims

By Matthew Best, Senior Underwriting Manager

This article was first published in the June edition of APIL's PI Focus magazine

Having written previously on likely case areas for Covid-19 clinical negligence claims, in this update I have further thoughts on that topic, but also consider other types of litigation, including a potential 'minefield' of concerns surrounding nursing and care homes.

I'd like to start with my view that there will be a significant rise in personal injury claims resulting from the pandemic. Whilst I recognise that NHS staff performed heroically treating Covid-19 patients, there will inevitably be focus on certain aspects of the care provided; particularly at the start of the pandemic in early spring 2020. Then there are the NHS (or Scottish Government) decisions' concerning the treatment prioritisation and screening of patients.

Another area of scrutiny is the decision to move elderly hospital patients out of the hospital system into nursing and care homes; most without a Covid-19 test. It was widely reported this decision was made to clear space for an anticipated significant increase in Covid-19 patients.

Consideration could be given to undertaking a review into actual ITU bed occupancy in each hospital to see if the data supports that the action taken was a necessary one.

Due to care/nursing home staff being unaware of the condition of the patients sent to them, it seems highly likely many of them unknowingly passed the virus on to both staff and other residents, causing a spike in care home infections.

This, sadly, led to a significant increase in the number of deaths - one vastly in excess of what was expected at that time, or indeed, any time of year. Hindsight may be easy, but this was clearly a questionable strategy.

So how should those cases be approached?

In my opinion anybody running such a claim will need to review the initial decision taken by the referring hospital or doctor i.e. who took it, when and relying on what information?

- A case should focus on what the doctors knew or ought to have known about the medical condition of those patients; in

particular, were they likely to be in a category of patients who may already have Covid-19?

- The same can be said for a delayed diagnosis of cancer patient, which I touched upon previously. If the answer to any such questions is yes, then the courts ought to conclude there was a duty of care on the part of the referring doctor/hospital.
- This would be to either test the patient prior to discharge or, at the very least, inform the care home staff that the patient being transferred had not been tested and therefore in a category of all patients who may have Covid-19. Had they done so, protective measures would presumably have been put into place.

On any rational analysis of the published figures, it appears this policy of not testing prior to transfer led to many more deaths in nursing homes. Deaths that might have been prevented had the hospitals tested many more patients.

It will not be until the first cases come through the courts - perhaps later this year - that we will get an indication of how the courts are likely to approach such matters.

Clearly, some issues may appear easier to navigate through than others. I think it would take a brave solicitor bringing a claim ostensibly for lack of provision of PPE or even a safe workspace for, say, bus drivers, supermarket staff and other key workers.

A claim might stand a better chance for employees 'forced' to come into an office where social distancing wasn't possible or not even attempted. Examples of this could include construction workers.

Continued on page 3 >>

<< Continued from page 2

One final area of difficulty will be cases based on Hospital Acquired Covid-19 (similar to the MRSA claims). Other case types might well be easier factually, including clinical negligence cases for -

- failure to diagnose or failure to treat effectively, and
- for non-Covid patients (Cancer/Heart) who have had treatment cancelled/delayed as a result of dealing with Covid-19.

In these situations we will need to look at whether the delay was 'reasonable' in the circumstances; the 'circumstances' being that we were in a lockdown/partial lockdown etc.

Of course there may be sympathy for the NHS which may, in effect, mean a slightly higher bar set for what is considered 'reasonably competent', one that will be interpreted by the courts through the lens of a pandemic.

Breach of duty may therefore need to be more obvious before a case is taken on. There will also be causation risks around how effective a solicitor could say earlier treatment would have been.

One final factor is that, unless a patient passes away, there are currently few reports on the long-term effects of Covid-19. This means, save for fatal cases, damages awarded in many of them may well be modest. Assuming say a 3-6 month recovery period then, unless you have a particularly high earner, these claim values are likely to be under £25k - a further reason to be even more cautious.

In conclusion, in order to give your clients the very best chance of obtaining access to justice, identifying the key issues so you are ready when Covid-19 claims start to emerge, and the likely attitude of the courts will be vital.

We may of course be waiting quite some time for these cases to emerge after No 10 announced, to the anger of bereaving families, by telling them it will be too busy to start an inquiry into the UK's handling of the Covid pandemic for months. The government's position, to effectively place the inquiry into the long grass has certainly caused unrest among many people, I can quite understand why.

Please do call me on 01483 514804 or email matthew.best@temple-legal.co.uk with your observations on this topic or to discuss your ATE insurance requirements.



Nice to see you again! Getting back to face-to-face

By Peter Morgan, Senior Underwriter

In addition to the excitement of three of the home nation's football teams' participation in the 'Euros', we are just as excited to announce Temple is starting to organise and attend some face-to-face external events. This will mean that (hopefully) we can meet, at last, with our business partners and prospects whilst still of course engaging in virtual activities.

There are many interesting events and conferences coming up over the next few months and a number of these are planning to permit physical attendance at them. Here at Temple we will be exhibiting at the APIL Clinical Negligence conference at Celtic Manor in September with the theme being Sensory Injuries.

With almost two years of being unable to attend a conference in person, it will be good to have a catch up with many of our Coverholders and to meet new firms, so please come and visit our stand; we look forward to meeting you there.

Elsewhere, we will have been participating in the Guildford Legal walk on 30 June which is raising awareness and funds for The London Legal Support Trust. For further information on The London Legal Support Trust please visit <https://londonlegalsupporttrust.org.uk>

Hospitality-focused events Temple are organising may well include sailing, horse racing, cricket and brewery trips. We will be in touch to invite you to an event in your local area soon.

Of course some of these events depend on the lifting of any remaining lockdown restrictions. In the meantime enjoy the weather, the football, the barbeques and we look forward to meeting with you in the near future.

New: Nursing Care and Care Home Claims web page

Nursing Care and Care Home Claims is the latest addition to our website with in-depth ATE insurance information on these cases for clinical negligence litigators. [Click here](#) to find out more.





Covid-19 claims update

By David Stoker, Senior Underwriter

The general thread here is that all of our customers will be taking a cautious approach in respect of new COVID-19 related cases. Temple is helping all our partner law firms through these challenging times and wanted to share some of the thoughts and information we have gathered over the last year or so.

Some customer law firms have mentioned they would prefer to wait for the outcome of the Spring 2022 public inquiry. Critics have said that is too far away, although Boris Johnson insists it needs this time not least to agree the way forward with devolved governments. The other issue as we see it is that public inquiries can take a long time to reach conclusions - for instance 'Bloody Sunday' required 12 years and the Iraq War 7 years.

A perception exists that a great number of delayed diagnosis cases will present in the near future. It is anticipated that the NHS and other healthcare institutions will receive a great deal of judicial sympathy and only the most extreme cases will succeed. We know that many doctors and surgeons were taken away from their day-to-day work in order to deal with the surge in new infections.

A good example of the thinking here came from a very experienced clinical negligence lawyer; 'There may be the occasional bespoke case that we may look at, but at present our view is that the circumstances would have to be clear and pretty extreme - and those cases would be risk assessed in team meetings on an individual basis. I have to say it is hard to envisage a case that we would want at present. The firm-wide risk assessment therefore doesn't change in that these cases for us as they would already fall into the high-risk bracket, meaning that such cases would never be accepted without a litigation meeting discussion and approval'.

Some firms are prepared to take a slightly different view (i.e. unilateral decisions being made to postpone cancer treatment for months due to COVID risks - this is at the very least a risk balancing exercise which will feed into a consent type argument, but in some

cases could just be plain wrong as the risk of progression was so much more significant than the COVID risk).

Other views include that bringing a COVID-specific claim (either failure to provide PPE, failure to screen or failure to treat) is likely to be very difficult and will, in all probability, meet resistance from the Courts on policy grounds. The feeling is that the vast majority of such new enquiries would be declined.

Some firms will build COVID risk considerations into their initial risk assessments and some won't as they will be identifiable and automatically fall into a high-risk category along with vulnerable clients. Whatever method is used to risk assess, a very cautious approach will always be required, and it will take a few COVID-related cases to go through the courts to confirm or disprove today's concerns.

What we do know right now is that cases are taking longer to deal with, and some have stopped completely for want of such things as medical records. Medical examinations are proving difficult to secure. Some firms have seen a marked reduction in new cases, and some have ceased taking any new ones on until the lockdown eases further still and the whole process can return to what it was pre-March 2020. At least clients are now beginning to see experts face-to-face and one hopes backlogs will clear and we look forward to a better remainder of 2021 and thereafter.

If you have any questions on potential COVID-related cases, please do not hesitate to contact David Stoker on 01483 514808 or send an email to david.stoker@temple-legal.co.uk



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Special Report: QOCS for Scotland Imminent

By Matthew Best, Senior Underwriting Manager

The imminent introduction of costs shifting (or QOCS as it has been labelled) in Scotland for personal injury and clinical negligence cases provides a good opportunity for Scottish lawyers to explore the prospects of arranging After-The-Event (ATE) legal expenses insurance for their clients at an affordable price.

The experience of the same changes in England and Wales over 8 years ago should give a good indicator to Scottish lawyers representing pursuers. One consequence is that, since 2013, ATE insurance premiums have reduced significantly.

ATE insurance has been available in Scotland for nearly 20 years, but the premium rating has often appeared too high for many pursuers to contemplate.

The new rules on QOCS for Scotland will be significant because they alter the “loser pays” principle in personal injury actions. In these cases, if the pursuer is unsuccessful, they will no longer be liable for the defender’s legal expenses, provided they conducted the proceedings “in an appropriate manner”. Pursuers will though still face the risk of paying for their own outlays if they lose.

In clinical negligence cases and higher value personal injury cases those outlays are often expensive.

Outlay funding, known as disbursement funding in England and Wales, has proven very popular with clients of our partner law firms. This feature can be easily added to your ATE insurance offering from Temple.

In England and Wales, it is generally more difficult to arrange cover for an individual case and increasingly necessarily for a law firm to agree a facility with an ATE insurance provider. If you’ve not done so already, we recommend that Scottish personal injury and clinical negligence law firms to engage immediately with ATE insurers to ensure they will have a guaranteed insurance facility in place.

Liability insurers and their representatives will still continue to challenge the introduction of costs shifting in Scotland. The experience of this in England and Wales has not caused claims frequencies to rise. In fact, for certain types of personal injury case

there has been a reduction in claims - although I accept this may be due to other reforms rather than just costs shifting alone.

So what do we know about QOCS for Scotland?

That the new rules will apply to personal injury proceedings raised after 30 June 2021. This has created a temptation to delay raising claims, particularly where the prospects of success are less clear cut, until after that date - and we may see a sharp increase in the number of personal injury cases raised from then.

We also note from the framework, that -

- QOCS will apply to restrict a pursuer’s liability for expenses in personal injury proceedings (including appeals). The current Scottish legal reforms do not extend to commercial litigation.
- The effect is that the court will not make an award of expenses (costs) against an unsuccessful pursuer, so long as the case has been conducted “in an appropriate manner”: the protection of QOCS will be lost if the pursuer or their legal representative behave fraudulently, or in a manifestly unreasonable manner, or conduct the proceedings in a manner considered an abuse of process.
- The protection of QOCS does not extend to expenses relating to another type of claim brought alongside a personal injury claim in the same proceedings.
- Provision is made for the rules to specify exceptions to the default application of QOCS.
- QOCS will only apply to claims or proceedings commenced on or after 30 June 2021. Where proceedings are brought on or after that date, QOCS will not apply to any work undertaken on the claim in advance of proceedings being commenced.

Continued on page 7 >>

<< Continued from page 6

We feel that there are likely to be test cases, particularly around the interpretation of provisions in the 2018 Act which set out the circumstances in which a pursuer is said not to have conducted the proceedings in an appropriate manner.

Clarification on how those provisions will be interpreted, particularly the phrases “fraudulent representation”, “manifestly unreasonable” and “abuse of process”, which have not been defined in the 2018 Act, will be eagerly anticipated by litigants on both sides of a potential personal injury action.

I consider there is a real opportunity for Scottish lawyers to be able to offer their pursuer clients the option of affordable insurance protection.

ATE insurance providers already offer insurance in Scotland and many pursuers take up such cover. At Temple Legal Protection we have been providing ATE insurance in Scotland for nearly 20 years and are currently engaging with many law firms to ensure they are ready to offer this to their clients as soon as QOCS is introduced.

If you do one thing after reading this, please review your ATE insurance and outlay funding arrangements/requirements and have dialogue with your insurers.

Temple is already working or in dialogue with a number of Scottish law firms who are interested in seeing what we can provide their clientele. We would be only too pleased to present you our ATE insurance and outlay funding at very competitive rates.

To discuss your firm’s situation, please call me on 01483 514804 or email matthew.best@temple-legal.co.uk with your observations on these issues or to discuss your ATE insurance requirements.



‘Temple are friendly, practical and accommodating’ - your words, not ours

We were flattered to receive these kind words from Michael Hartley at Goodlaw Solicitors.

“Further to our recent correspondence, I was just emailing, on the back of a number of recent interactions with Temple over policies and funding, to say how refreshing it is to work with such a flexible ATE provider.

As you know, and rather sadly for me, I have been doing this work for a very long time - over 30 years, on and off - at a number of firms, of all different sizes and qualities, and so have been working with pretty much the whole gamut of ATE providers for most of that time.

I would like to say that Temple is, entirely sincerely, the best of those that I have ever had the pleasure to work with. I feel that both sides in our current relationship have worked very hard to foster that relationship and, in my view, this has borne substantial fruit for both of our firms.

The basis of this view includes, but is not necessarily limited to, the following:

- The delegated authority scheme is reasonable, flexible and, via TOPS, extremely easy to use.
- Very importantly too, unlike many other ATE providers I have known, the reporting requirements are sensible and not at all onerous.
- Applying for and obtaining bespoke policies, where the delegated scheme does not apply, is also pleasantly straightforward and, in my personal experience, always reasonable and positive; and
- Without exception, the staff that I have dealt with, at all levels, are always reasonable, friendly, practical and accommodating.

In all seriousness, I can say with complete sincerity that I think the point our respective firms have reached these days is a very good, pleasant and mutually helpful, profitable and respectful one. I look forward to many more fruitful years to come. Thanks to you and the rest of Temple’s staff.”

[Click here](#) for more testimonials from our partner clinical negligence law firms.

ATE insurance in action: surgical mesh cases



The BBC prime time drama ‘Casualty’ has had some pretty big issues to deal with down the years and never more so than over the last twelve months; so here at Temple we were delighted to see the scriptwriters used a recent episode to highlight, amongst other things, the hidden but hugely important issue of surgical mesh.

These implants have been widely used in the last twenty years but there have been extensive reports of numerous health complications such as debilitating pain, bleeding and difficulty walking following surgery.

Implants of surgical mesh are used to treat conditions such as hernias, stress incontinence and prolapse in women. Unfortunately in many cases this has led to painful and unnecessary complications for patients.

In a recent episode, viewers saw character Marty’s (Shaheen Jafargholi) mother Bibi brought into the emergency department and treated for complications following vaginal mesh surgery. What was really pleasing was to see the character Dr Dylan Keogh (played by William Beck) explain the issue with the mesh to Marty. Particularly that whilst complications only occur in 3% of cases, this actually means thousands of women.

In recent years, Temple has helped hundreds of patients receive justice for the problems they have faced, by working closely with our partner law firms who are at the forefront of seeking to obtain the right compensation for people who have suffered from these and other inadequate medical products.

If you have a question about a surgical mesh case, please call Matthew Best on 01483 577804 or send an email to matthew.best@temple-legal.co.uk

Really quite interesting? What’s caught our eye recently



We all love a list, especially a useful list. Below are links to some topical articles, blog posts, events and video on clinical negligence and personal injury litigation and ADR that have caught our eye in the last three months.

June 23rd: [APIL Clinical Negligence Update 2021: video highlights from 23/6/21 online event](#) - This one-day course was designed specifically for clinical negligence lawyers. It covers a range of relevant topics, bringing you fully up to date on all developments. A recommended watch.

June 3rd: [‘Number of Covid PI claims remains low “but potential for many more”](#) An interesting read this one; whilst the number of personal injury claims relating to Covid-19 continues to be very low, there are signs that they’re gathering momentum.

May 25th: 12 KBW blog: [‘Fundamental dishonesty and clinical negligence: a fraud on the taxpayer?’](#) Who said fundamental dishonesty never rears its ugly head in clinical negligence? Charlotte Reynolds of 12 KBW discusses some recent clinical negligence cases involving allegations of fundamental dishonesty and some key points that can be taken from these.

May 10th: [NHS to put stronger focus on learning from litigation claims](#) - In this Litigation Futures article, the NHS says it will place stronger focus on learning from litigation claims. Learning from litigation is valuable, with cooperation and collaboration a big area to learn from.

April 29th: [Ropewalk Clinical Negligence blog: ‘Cauda Equina: Tells & Tales About the “Horse’s Tail”](#)’ - Here, Patrick Limb QC reminds us of the Cauda Equina Syndrome (CES) ‘red flags’ and also discusses some CES case law.

March 29th: [‘Time to take the ‘alternative’ out of ADR, says Master of the Rolls](#)’ - Litigation Futures reports that The Master of the Rolls wants to “take the ‘alternative’ out of ADR” and ensure it is integrated into every stage of the dispute resolution process. Another good read.

For all our latest news please visit the [Temple website](#). Our podcasts can be listened to at www.temple-legal.co.uk/news/podcasts/, previous webinars watched at www.temple-legal.co.uk/news/webinars/ and previous newsletters viewed at <https://www.temple-legal.co.uk/news/newsletters/>.

CLINICAL THINKING

Solicitor updates and insights on clinical negligence and personal injury topics

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Location Challenge met - at the double.



By Lisa Fricker, Solicitor Services Manager

Over the late May Bank Holiday weekend, Temple's staff participated in a location challenge to raise funds for one of our chosen charities this year, the Queen Elizabeth Foundation. The challenge was for staff to cover the distance between our office in Bristol and the Temple head office in Guildford - which equated to a 110-mile trip.

A number of our staff participated in the event over the three-day period and nearly double the number of miles required was completed. This involved a number of activities, such as walking (some of our staff's dogs got extra-long walks for the weekend), running and sailing - to name a few.

The funds raised from this challenge will go towards much needed equipment to ensure that the charity can keep supporting disabled people of all ages to increase their independence and live the life they choose.

For more details on the work of the Queen Elizabeth Foundation, please visit their website www.gef.org.uk

Contacts:

Matthew Best | Senior Underwriting Manager

Matt's day-to-day role involves managing a large number of ATE insurance schemes for law firm's clinical negligence and personal injury claims. In addition he uses his experience to ensure that their Temple disbursement funding facilities are set up and run smoothly. He is often seen at APIL, AvMA and SCIL conferences sharing his expertise.

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Lisa Fricker | Solicitor Services Manager

Lisa has over 15 year's experience in the legal insurance industry, and is used to working closely with solicitors to develop and maintain good working relationships. In her role Lisa manages our internal and external review process and is focused on ensuring that the quality of service provided by Temple remains at the highest standard.

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David Stoker | Senior Underwriter

David's experience allows him to undertake a key role within Temple's ATE insurance personal injury and clinical negligence teams. He also participates in the assessments of delegated schemes that Temple provide to help our customers make the most of the products and services we offer.

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Peter Morgan | Senior Underwriter

Peter is responsible for assessing risks along with the day to day management of delegated authority schemes. He is also available to help with any underwriting questions to ensure customers are getting the best from their Temple ATE and funding products.

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Alex Stracey | Senior Underwriter

Alex has over 14 years experience within the LEI market in both ATE and BTE. She is used to working closely with solicitors to ensure the best outcomes for their clients. Her experience allows her to match customer requirements with Temple's products and services. Alex is happy to assist with any queries that arise on a day to day basis.

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Philip Pipkin | Underwriting Support Manager

Philip's integral role at Temple is to ensure that personal injury and clinical negligence underwriting tasks are dealt with quickly and professionally. He mainly deals with initial ATE insurance enquiries and general underwriting issues but also assists in the maintenance and introduction of delegated schemes to Temple's customers.

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